

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION

RANDY T. JOHNSON,

Plaintiff,

v.

JO ANNE B. BARNHART, Commissioner  
of Social Security,

Defendant.

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) Civil Action No. 7:04CV00203

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) **MEMORANDUM OPINION**

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) By: Hon. Glen E. Conrad

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Plaintiff has filed this action challenging the final decision of the Commissioner of Social Security denying plaintiff's claims for disability insurance benefits and supplemental security income benefits under the Social Security Act, as amended, 42 U.S.C. §§ 416(i) and 423, and 42 U.S.C. § 1381 et seq., respectively. Jurisdiction of this court is pursuant to 42 U.S.C. § 405(g) and 42 U.S.C. § 1383(c)(3). As reflected by the memoranda and argument submitted by the parties, the issues now before the court are whether the Commissioner's final decision is supported by substantial evidence, or whether there is "good cause" to necessitate remanding the case to the Commissioner for further consideration. See 42 U.S.C. § 405(g).

The plaintiff, Randy T. Johnson, was born on October 9, 1967 and eventually completed the ninth grade in school. The record suggests that, while in school, plaintiff was placed in special education classes and received social promotions. Mr. Johnson has worked as a construction laborer, carpet installer, press operator, and factory laborer. He last worked in 2000. On April 8, 2001, Mr. Johnson filed applications for disability insurance benefits and supplemental security income benefits.

Plaintiff alleged he has been disabled since his birth on October 9, 1967 due to a learning disability.

Plaintiff now maintains that he has remained disabled to the present time. As to his claim for disability insurance benefits, the record reveals that Mr. Johnson met the insured status requirements of the Act at all relevant times covered by the final decision of the Commissioner. See, generally, 42 U.S.C. §§ 414 and 423.

Mr. Johnson's claims were denied on initial consideration and reconsideration. He then requested and received a de novo hearing and review before an Administrative Law Judge. In an opinion dated February 18, 2003, the Law Judge also ruled that plaintiff is not disabled. The Law Judge found that Mr. Johnson suffers from borderline intellectual functioning and some antisocial traits. Because of these impairments, the Law Judge determined that plaintiff is disabled for all of his past relevant work roles. The Law Judge assessed Mr. Johnson's residual functional capacity as follows:

The claimant has the residual functional capacity to perform physical work-related activities at all levels of exertion, where he is not required to maintain concentration or attention for prolonged periods, would not be under production or speed requirements and where he would not interact with people on a regular basis. (TR 22-23).

Given such a residual functional capacity, and after considering plaintiff's age, education, and prior work experience, as well as testimony from a vocational expert, the Law Judge found that Mr. Johnson retains sufficient functional capacity to perform several alternate work roles which exist in significant number in the national economy. Accordingly, the Law Judge ultimately concluded that Mr. Johnson is not disabled, and that he is not entitled to benefits under either federal program. See 20 C.F.R. §§ 404.1520(f) and 416.920(f). The Law Judge's opinion was adopted as the final decision of the

Commissioner by the Social Security Administration's Appeals Council. Having now exhausted all available administrative remedies, Mr. Johnson has appealed to this court.

While plaintiff may be disabled for certain forms of employment, the crucial factual determination is whether plaintiff is disabled for all forms of substantial gainful employment. See 42 U.S.C. §§ 423(d)(2) and 1382c(a). There are four elements of proof which must be considered in making such an analysis. These elements are summarized as follows: (1) objective medical facts and clinical findings; (2) the opinions and conclusions of treating physicians; (3) subjective evidence of physical manifestations of impairments, as described through a claimant's testimony; and (4) the claimant's education, vocational history, residual skills, and age. Vitek v. Finch, 438 F.2d 1157, 1159-60 (4th Cir. 1971); Underwood v. Ribicoff, 298 F.2d 850, 851 (4th Cir. 1962).

After a review of the record in this case, the court is unable to conclude that the Commissioner's final decision is supported by substantial evidence. Mr. Johnson suffers from strictly nonexertional impairments. As noted by the Administrative Law Judge, plaintiff possesses limited intellectual capacity. He also suffers from a personality disorder with antisocial traits. There are two psychological studies of record. In the earlier study, Mr. Johnson's IQ was measured in the low 70s. In the second study, plaintiff's IQ was measured in the 60s. School records confirm limited mentation and poor academic development. Mr. Johnson contends that, when considered with his personality disorder, the substandard IQ measurements are such as to support the existence of an impairment, or

combination of impairments, which meets or equals a listed impairment under Rule 12.05(C) of Appendix I to Subpart P of the Administrative Regulations No. 4.<sup>1</sup>

The court believes that the issue of medical equivalence in this case has not been adequately explored. As previously noted, there are three primary sources of evidence dealing with plaintiff's intellectual deficiencies and personality disorder. Bede Pantaze, a clinical psychologist, completed a mental status evaluation on November 13, 2001. Based on psychological testing, Ms. Pantaze noted a verbal IQ of 76, a performance IQ of 72, and a full scale IQ of 72. Ms. Pantaze noted no signs of personality disturbance. On April 11, 2002, several weeks prior to the administrative hearing, plaintiff's attorney submitted a multitude of school records, including psychological assessments of Mr. Johnson. These studies document borderline intellectual function as well as substantially substandard academic achievement.<sup>2</sup> Finally, Dr. Pamela Tessnear completed a psychological evaluation on May 21, 2002, several days prior to the administrative hearing. As previously noted, Dr. Tessnear reported IQ measurements in the 60s.<sup>3</sup> Dr. Tessnear diagnosed mild mental retardation as well as antisocial traits.

The difficulty in this case is that no medical consultant, state agency physician, or medical advisor was asked to consider the three sources of evidence in combination, so as to properly assess

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<sup>1</sup> If a claimant suffers from an impairment, or combination of impairments, which meets or equals a listed impairment under Appendix I, 20 C.F.R. §§ 404.1520(d) and 416.920(d) require a finding of disabled without consideration of factors such as age, education, and prior work experience.

<sup>2</sup> Several months after the administrative hearing, plaintiff's attorney also submitted a note from plaintiff's school psychologist which confirms that plaintiff experienced a personality disorder while he was still a student.

<sup>3</sup> Such measurements fall within the range required under 12.05(C) of Appendix I.

the issue of medical equivalence. A state agency physician completed a residual functional capacity assessment and a psychiatric review technique form on November 15, 2001, immediately following receipt of Ms. Pantaze's psychological report but prior to the submission of the school records and Dr. Tessnear's psychological study. Thus, there has been no medical assessment as to the significance of the school studies or Dr. Tessnear's psychological evaluation.

In determining whether a claimant's impairment, or combination of impairments, is medically equivalent to a listed impairment in Appendix I, 20 C.F.R. §§ 404.1526(b) and 416.926(b) provide as follows:

*(b) Medical equivalence must be based on medical findings.* We will always base our decision about whether your impairment(s) is medically equal to a listed impairment on medical evidence only. Any medical findings in the evidence must be supported by medically acceptable clinical and laboratory diagnostic techniques. We will also consider the medical opinion given by one or more medical or psychological consultants designated by the Commissioner in deciding medical equivalence.

In Mr. Johnson's case, no medical or psychological consultant passed on the issue of medical equivalence. Indeed, the psychiatric review technique form in this case was completed well before receipt of the more probative longitudinal evidence. See, generally, 20 C.F.R. §§ 404.1520(a) and 416.920(a). No medical advisor testified at the administrative hearing. The court must conclude that there is "good cause" for remand of this case to the Commissioner for further consideration as to whether plaintiff's intellectual deficiencies and personality disorder are such as to meet or equal a listed impairment under Appendix I.

Given the court's disposition in this matter, the court finds it unnecessary to consider plaintiff's alternate motion for remand of his case based on incomplete hypothetical questions put to the

vocational expert. In passing, the court notes that the hypothetical question posed by the Administrative Law Judge did not include any explicit reference to plaintiff's limited mentation. On the other hand, plaintiff's attorney had the opportunity to question the vocational expert based on findings suggested by Dr. Tessnear's psychological evaluation. In any event, once plaintiff's residual functional capacity is assessed by a medical consultant who is able to consider all of the psychological, neurological, and school records, a more comprehensive hypothetical question, if necessary, can be put to another vocational expert.

For the reasons stated, the court has found "good cause" for remand of this case to the Commissioner for further development and consideration as outlined above. If the Commissioner is unable to decide this case in plaintiff's favor on the basis of the existing record, the Commissioner will conduct a supplemental administrative hearing at which both sides will be allowed to present additional evidence and argument. The court believes that it would be helpful if a qualified medical advisor could be designated to participate at any such supplemental administrative hearing. An appropriate order of remand will be entered this day.

The Clerk is directed to send certified copies of this Memorandum Opinion to all counsel of record.

ENTER: This 15<sup>th</sup> day of September, 2004.

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/S/ GLEN E. CONRAD  
United States District Judge

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By: Hon. Glen E. Conrad

United States District Judge

**ORDER**

For reasons set forth in a Memorandum Opinion filed this day, it is now

ADJUDGED AND ORDERED

as follows:

1. This case shall be and hereby is REMANDED to the Commissioner for further consideration and development as specified in the Memorandum Opinion filed herewith this day; and
2. Upon remand, should the Commissioner be unable to decide this case in plaintiff's favor on the basis of the existing record, the Commissioner shall conduct a supplemental administrative hearing at which both sides will be allowed to present additional evidence and argument.

The parties are advised that the court considers this remand order to be a "sentence four" remand. See Melkonyan v. Sullivan, 501 U.S. 89, 111 S. Ct. 2157 (1991); Shalala v. Schaefer, 509 U.S. 292, 113 S. Ct. 2625 (1993). Thus, this order of remand is a final order. Id. If the Commissioner should again deny plaintiff's claim for benefits, and should plaintiff again choose to seek judicial review, it will be

necessary for plaintiff to initiate a new civil action within sixty (60) days from the date of the Commissioner's final decision on remand. See 42 U.S.C. § 405(g).

The Clerk is directed to send certified copies of this Order to all counsel of record.

ENTER: This 15<sup>th</sup> day of September 2004.

/S/ GLEN E. CONRAD

United States District Judge